

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement:	
A. Background	4
B. The disbarment proceeding	6
C. Committee's findings	8
D. Court review	13
Reasons for granting the writ	14
Conclusion	27
Appendix	28

CITATIONS

Cases:

<i>Adriaans, In re</i> , 28 App. D. C. 515	18
<i>Broadcasting Service Organization, Inc. v. Federal Communications Commission</i> , 171 F. 2d 1007, pending on petition for writ of certiorari, No. 584, this Term	15, 25
<i>Hannegan v. Read-Magazine</i> , 158 F. 2d 542, reversed sub nom. <i>Donaldson v. Read Magazine</i> , 333 U. S. 178	15
<i>Hartford-Empire Co. v. Hazel-Atlas Glass Co.</i> , 59 F. 2d 399	5
<i>Hartford-Empire Co. v. Hazel-Atlas Co.</i> , 137 F. 2d 764	6, 19
<i>Hazel-Atlas Glass Co. v. Hartford-Empire Co.</i> , 322 U. S. 238, rehearing denied, 322 U. S. 772	2, 6, 14, 17, 18, 26
<i>Precision Instrument Co. v. Automotive Co.</i> , 324 U. S. 806	15, 25, 26
<i>Shawkee Mfg. Co. v. Hartford-Empire Co.</i> , 68 F. 2d 726	5
<i>United States v. Hartford-Empire Co.</i> , 46 F. Supp. 541	6, 20
<i>WOKO, Inc. v. Federal Communications Commission</i> , 153 F. 2d 623, reversed, 329 U. S. 223	15, 18, 25, 26

Statute:

35 U. S. C. 11	-2, 16, 25
----------------------	------------

Miscellaneous:

Federal Rule of Civil Procedure 20	20
------------------------------------------	----

National Glass Budget:

<i>Introduction of Automatic Glass Working Machinery; How Received by Organized Labor</i> , by William C. Clarke, President, American Flint Glass Workers Union	4
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

**LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS, PETITIONER**

v.

VERNON M. DORSEY

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of Lawrence C. Kingsland, Commissioner of Patents, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 26, 1949.

OPINIONS, BELOW

The findings and opinion of the District Court of the United States for the District of Columbia (R. 20-49) are reported at 69 F. Supp. 788. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 141-156) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1949 (R. 156). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.

2. Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that respondent had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the *Hazel-Atlas* case.

3. Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office.

STATUTE INVOLVED

35 U. S. C. 11 reads as follows:

The Commissioner of Patents, subject to the approval of the Secretary of Commerce, may prescribe rules and regulations governing the

recognition of agents, attorneys, or other persons representing applicants or other parties before his office, and may require of such persons, agents, or attorneys, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the Office. The Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be duly recorded. The action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine. (R. S.

§ 487; Feb. 14, 1903, ch. 552, § 12, 32 Stat. 830; Feb. 18, 1922, ch. 58, § 3, 42 Stat. 390; June 25, 1936, ch. 804, 49 Stat. 1921.)

STATEMENT

A. *Background*: Respondent Dorsey is an attorney who during the period covered by the facts here involved was patent counsel for and a member of the Board of Directors of Hartford-Empire Company (R. 56).¹

The July 17, 1926, issue of the National Glass Budget, a trade publication in the glass industry, contained an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor by William P. Clarke, President, American Flint Glass Workers Union." A copy of this article, accompanied by a letter of transmittal signed by Vernon M. Dorsey, respondent herein, was filed among other things in the Patent Office on October 11, 1926, by the attorneys for Hartford-Empire Company (successor to Hartford-Fairmount Company) (Hartford) as an appendix to the supplemental amendment to Hartford's Peiler application No. 294,792, filed on May 5, 1919, for a patent for a method of and apparatus for feeding molten glass. (R. 66, Ex. HB-61, Tr. 815-821).

¹ The entire transcript of record of the proceedings before the Patent Office was in the record before the courts below and has been certified to this Court, but only the joint appendix and addenda to respondent's brief below are included in the printed portion of the record here. As permitted by stipulation of counsel (R. 158), this brief refers to portions of the transcript of the record before the Patent Office (Tr.), some pertinent parts of which are set forth in the appendix to this petition, *infra*, pp. 28-31.

At the time of this amendment, many of the claims in the application had already been rejected once by the Primary Examiner. After final rejection of the claims by the Primary Examiner, the Clarke article was reprinted in the Appendix to a brief signed by Dorsey and Robson D. Brown and was urged, *inter alia*, upon the Office's Board of Appeals as the recognition by a reluctant witness of the tremendous success of Hartford's feeders (R. 119, Ex. E, pp. 477-478, 509, 593-605). The Board of Appeals affirmed the Examiner's holding that the claims were unpatentable over prior art references (Ex. E, pp. 684-691). At rehearing, in connection with which a brief signed by Dorsey was filed, the Examiner was reversed, and the claimed invention held patentable with respect to all but two claims. Patent No. 1,655,391 (Peiler patent) on these claims was issued on January 3, 1928 (Ex. E, pp. 732-734). In the subsequent litigation with Hazel-Atlas Glass Company (Hazel-Atlas), the Clarke article was cited in Hartford's brief in the Third Circuit Court of Appeals and quoted extensively by Judge Buffington in his opinion in 1932, holding (Judge Woolley dissenting) that the Peiler patent was valid and had been infringed. *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F. 2d 399. See, also, *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 68 F. 2d 726 (C. A. 3).

In the course of the Government's anti-trust proceeding against Hartford begun in 1939 in the United States District Court for the Northern Dis-

trict of Ohio, Western Division, the fact that the Clarke article had been written by an employee of Hartford, named Hatch, who had persuaded Clarke to sponsor the article, for the purpose of filing it with the Patent Office as the views of an apparently unprejudiced and reluctant witness was brought to light. *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612 (N. D., Ohio). Based on the information thus disclosed, Hazel-Atlas and Shawkee Mfg. Co. petitioned the Court of Appeals for the Third Circuit to vacate and set aside its prior judgments on the ground of fraud. That court, while it described the story as sordid and pointed by name to four participants, including Dorsey, held that it would be without power to reopen its judgment. *Hartford-Empire Co. v. Hazel-Atlas Co.*, 137 F. 2d 764, 766. This Court, in reversing, was unanimous in its condemnation of the Clarke transaction as fraudulent. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 245-246, 251.

B. *The Disbarment Proceeding*: On October 11, 1944, shortly after this Court's denial of rehearing in the *Hazel-Atlas* case (322 U. S. 772), the Commissioner of Patents issued separate orders to each of the four men named in the Third Circuit's opinion as the perpetrators of the fraud, Vernon M. Dorsey, Hartford's Washington patent attorney, Roswell F. Hatch, Robson D. Brown, employees of Hartford, and Henry W. Carter, an of-

ficial of Owens-Illinois Bottle Company (Owens) to show cause why he should not be suspended or excluded from further practice before the Patent Office for gross misconduct (R. 12-13). In the order, the Commissioner set November 9, 1944, as the date for hearing before his Committee on Enrollment and Disbarment, and charged that it appeared from the records in the *Hazel-Atlas* case and the antitrust case that each of these men

* * * participated in the preparation of [the Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application * * *.

In accordance with the show cause orders, a hearing was held beginning on November 21, 1944, before a Committee on Enrollment and Disbarment composed of seven Patent Office officials. The case on behalf of the Patent Office consisted solely of the records in the *Hazel-Atlas* and the antitrust cases, which were introduced as the basis for the show cause orders, and as evidence for the limited purpose of proving against each defendant admissions and letters and documents written or received by that defendant. (R. 56-57, Tr. 32-38.) Thereafter, the defendants called and examined witnesses, including each of the defendants. At the

close of the hearing, time was granted to file briefs, after which oral argument was heard by the Committee, with the Commissioner sitting in. (R. 22.) On April 26, 1945, the Committee submitted a report to the Commissioner setting out its findings which may be briefly summarized as follows (R. 50-92):

C. Committee's Findings: In the latter part of 1925, Carter discussed with Brown, who in turn discussed with Dorsey, their interest in having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (R. 57, 95, 99). Shortly thereafter, Hatch, who reported to, and consulted with, Brown as his superior officer in Hartford, commenced the preparation of an article relating to automatic glass machines, which was completed early in 1926 (R. 58). The principal object of the article admittedly was to make a comparison "between the commercial success of the Owens suction machine and feeders of the gob type" (R. 58, Tr. 531). In the preparation of the article, Hatch consulted both Dorsey and Carter as well as the Reports of the Annual Conventions of the Glass Bottle Blowers Association (a labor union) and various other publications. (R. 58, 99-100.) As finally drafted by Hatch, the article quotes extensively from these reports in order to provide "bait" held out to induce a labor leader named James Maloney who was President

of the Glass Bottle Blowers Association to sign the article (R. 59, Ex. D-72-C, Tr. 759). Carter was fully informed about these matters, and severely criticized the accuracy of the article and suggested important changes therein (Ex. C-70-3, Tr. 745), but Hatch indicated that he had "prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein" (R. 61; Ex. C-70-4, Tr. 754; D. Ex. B, p. 40). Brown was likewise informed and he authorized Hatch to go ahead (R. 62; Tr. 356, 417, 418, 474).

Dorsey was also provided with a manuscript copy of the article (R. 101, 106). Dorsey made two or three minor corrections in the manuscript and returned it to Hatch (R. 62, 100). Dorsey knew that Hatch intended to ask Maloney to sign the article, and he desired a copy when signed for filing in the Peiler application (R. 62, 107-109, 114). Subsequently, he wired Hatch for a copy (R. 62, 115), to which Hatch replied on May 20, 1926 (R. 62-64, Ex. D-72-C, Tr. 759):

You flatter me again by wiring for a copy of the so-called "Maloney" article. I enclose one of the original drafts which I made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

* * * * *

* * * I went to see Mr. William P. Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended. * * *

* * * Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

I will see that you get a copy of some Journal in which this article appears when it comes out.

* * * * *

In the course of obtaining clearance from Owens, Carter, on May 25, 1926, addressed a memorandum to W. H. Boshart, its President, in which he said in part (R. 65-66; Ex. C-70-7, Tr. 763; D. Ex. B, p. 41):

It occurs to me that I should make myself more clear about the purpose of the Hatch article.

He has prepared it with the idea of getting it printed under the name of some apparently

unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

* * * * *

Under the circumstances, I do not see that we need be very critical in our treatment of the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out.

Owens thereupon agreed to the publication of the article. Immediately upon receiving, in addition, the consent of Maloney, Clarke on July 7, 1926, telegraphed Hatch that he would "sponsor article with very slight alteration and modifications" (R. 66, Ex. HB-10, Tr. 778, D. Ex. B., p. 132). Clarke signed the article some time the next day and handed it to Hatch, who was then in Philadelphia (R. 66). Hatch forwarded the article without delay to the editor of the National Glass Budget requesting that it be published promptly and advising him that Clarke would "not insist on seeing a proof if it is going to take extra time" (R. 66, Tr. 543). The article appeared in the July 17, 1926 issue of the National Glass Budget (R. 66). Dorsey requested a copy of the article (R. 69, 106-107), and a copy as printed was presented by Dorsey and Brown to the Patent Office as part of the October

11, 1926, amendment in the Peiler application² and later made use of by them in a brief filed with the Board of Appeals, as indicated *supra*, p. 5. Although they all knew before the article was filed in the Peiler application that it was to be filed therein, none of them ever disclosed to the Patent Office prior to the disbarment proceeding that the article was written and inspired by Hatch (R. 70).

The Committee went on to describe Hartford's payment of \$8,000 to Clarke shortly after the decision of the Court of Appeals for the Third Circuit which quoted extensively from the article (R. 74-82). These events relevant to the conduct of the defendants with respect to the Clarke article occurred nearly six years after the filing of the article. "These subsequent events," the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of [defendants] at that time" (R. 74). The Committee noted that Dorsey did not participate in these events. (R. 74.)

Based on these findings, the Committee was of the opinion that the record conclusively established that (R. 90)

* * * in the perpetration of such concealment all of the respondents deliberately col-

² The Committee noted that from the standpoint of practice, the filing of this amendment was timely since the Examiner was on the verge of finally rejecting all of the claims in the application (R. 71).

laborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application.

Five members of the Committee accordingly recommended to the Commissioner that respondents be disbarred from further practice before the Patent Office; the remaining two members recommended suspension for a definite period of time (R. 90-92). The Commissioner, on May 18, 1945, ordered the disbarment of all four defendants (R. 14-15).

D. Court Review: Three of the defendants³ sought review of these orders in the United States District Court for the District of Columbia in accordance with 35 U. S. C. 11. The District Court, after hearing extensive argument lasting five days, affirmed the Commissioner's order. (R. 20-49). Commenting that in such proceedings its function

³ The fourth, Robson D. Brown, died in the period between the Commissioner's order and the filing of the petition for review.

was limited to a determination whether a fair hearing had been had after due notice of the charges and whether there was substantial evidence to support the Commissioner's action (R. 24-25), the court held that the charges in the show cause orders were sufficient basis to sustain the Commissioner's action and sufficiently apprised defendants of the matters they were called upon to answer, and that there was substantial evidence in the record here to support the Commissioner's action. This conclusion was reached after a detailed review of the evidence in the record as to the preparation and filing of the Clarke article, and after referring to the events occurring thereafter "only as they may throw light upon the acts of the petitioners and their intent with respect to the Clarke article" in regard to the proceedings before the Patent Office (R. 34). On the appeal to the court below taken only by respondent, the judgment of the District Court was reversed by a divided court. Judge Clark delivered the opinion in which Judge Miller concurred (R. 141). Judge Edgerton dissented in a separate opinion (R. 155).

REASONS FOR GRANTING THE WRIT

This case involves the very transaction held fraudulent by this court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238. Respondent has been ordered disbarred by the Patent Office for participation in that fraud. Although undisputed evidence showed that respondent

knowingly contributed to the effectuation of the scheme, the court below has held his conduct entirely lawful, and indeed has even found that the entire transaction condemned by this Court was legitimate. The decision below thus conflicts with a holding by this Court concerning the very same transaction.

The case is also important as the latest of a series of pronouncements by the court below which fail to hold persons dealing with agencies of the federal government and with the public to basic standards of honesty and fairness which the agencies have sought to enforce and which this Court has approved. *WOKO, Inc. v. Federal Communications Commission*, 153 F. 2d 623, reversed, 329 U.S. 223; *Broadcasting Service Organization, Inc. v. Federal Communications Commission*, 171 F. 2d 1007, pending on petition for writ of certiorari, No. 584, this Term; *Hannegan v. Read Magazine*, 158 F. 2d 542, reversed, *sub nom. Donaldson v. Read Magazine*, 333 U.S. 178. Cf. *Precision Instrument Co. v. Automotive Co.*, 324 U.S. 806. In addition, the opinion below, without any basis in the record, goes to extremes to castigate an administrative agency for conduct which was not only entirely lawful and proper but which is in harmony with this Court's decisions. Under the decision below it will be difficult, if not impossible, for the Commissioner to enforce and give effect to the high standards laid down by this Court's decisions, inasmuch as review of disbar-

ment orders of the Commissioner of Patents is restricted to the courts of the District of Columbia Circuit. 35 U.S.C. 11. In view of the strategic position of the court below for reviewing administrative action generally and the proceedings of the Patent Office in particular, these facts in themselves call for an exercise of the supervisory authority of this Court.

The standards of conduct which the court below has approved give the case an importance much greater than the right of a single attorney to practice before the Patent Office.*

1. The court below has held that the filing in the Patent Office of the so-called Clarke article, which was written by Hartford's representatives but signed by Clarke, an ostensibly disinterested expert, in support of Hartford's Peiler patent application did not constitute fraud on the Patent Office, on the ground that "The test should have been the truth or falsity of the facts set out in the article and we do not understand that the truth of these statements has been called into question in any quarter" (R. 152). It further held that the Patent Office, by placing any reliance on the article, was remiss in its duty "to investigate these matters for itself, and not to shift the burden of its own responsibilities to a blind reliance on some article presented from some trade journal,

* It is, of course, unfortunate that the fraudulent scheme remained undiscovered for so long, and that as a result Mr. Dorsey is now almost 80 years old, but "the public and social interests in discouraging the fraudulent procurement of patents

which with ordinary intelligence it might have known to be self-serving for the party offering it" (R. 143).

The holdings squarely conflict with the express rulings to the contrary of this Court in the *Hazel-Atlas* case in regard to this very transaction. In that case, this Court reviewed in detail the circumstances relating to the preparation of the Clarke article, its filing in and use before the Patent Office and the Third Circuit.

The Court expressly rejected as immaterial the contention that the contents of the article were true, commenting "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators." 322 U. S. at 247.⁵ And it refused to appraise the influence exerted by the Clarke article. "Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published * * *. They are in no position now to dispute its effectiveness." 322

seem to me to outweigh appellant's interest in his reputation and practice." (Edgerton, J., dissenting R. 156.)

⁵ The District Court's opinion pointed out in this connection (R. 45):

The truth of the statements in the Clarke article was not an issue in these proceedings. It was expressly stated during the course of the hearings that it was not. Even though the article contained no mistakes or false statements, its weight as evidence depends as much upon its origin as its content.

U. S. at 247. Cf. *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223. This Court concluded, "even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" (322 U. S. at 245-246), and required that Hartford's prior judgment be vacated and Hartford be denied all relief. Refusal of the court below to accept these rulings is, we submit, sufficient in itself to warrant certiorari here.

The decision below condemns the Patent Office for "wait[ing] more than eighteen years until the evidence had largely disappeared to bring stale charges against" respondent (R. 144). But a similar contention was made in this Court against the reopening of the judgment adjudicating the validity of the patent. The Court noted that "Indisputable proof of the * * * facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States v. Hartford-Empire Company et al.*, 46 F. Supp. 541, an anti-trust prosecution begun December 11, 1939." 322 U. S. at 243. The Commissioner of Patents promptly issued the show cause order here after the *Hazel-Atlas* case was finally terminated by this Court's denial of rehearing. 322 U. S. 772. See R. 56.*

* *In re Adriaans*, 28 App. D.C. 515, relied on by the court below as a "hay-horse" case (R. 142), is distinguishable and

2. The characterization of the court below of the proceeding before the Patent Office's Committee on Enrollment and Disbarment as a "kangaroo court" (R. 144) and as "a classic exemplification of a citizen being deprived of a valuable right * * * without due process of law or indeed without process of law of any kind except bureaucratic 'lynch law' " (R. 141) was, we submit, utterly unjustified. The bases for the rejection by the court below of the decision of the Patent Office were (1) that there was not "a shred of evidence to connect" Dorsey with any fraud (R. 144), (2) that the consolidation of Dorsey's case with that of the other practitioners involved was a "record of mob procedure", constituting a "shot-gun joindure" (R. 149-150); (3) that Dorsey was convicted on charges not made and not given adequate notice of the charges against him (R. 144, 152); and (4) that the burden of disproving the allegations against him was improperly imposed upon Dorsey (R. 144).

a. Although the majority below found the evidence insufficient to support the findings, on substantially the same evidence both the Court of Appeals for the Third Circuit in the *Hazel-Atlas* case

not here controlling. In that case there was a 12-year delay in instituting charges, although all the facts relating to the alleged misconduct were known from the outset. In the present case, on the other hand, the delay was due to Hartford's success in concealing for at least 13 years the facts surrounding the Clarke article. Such success does not, of course, create a prescriptive right to exemption from the consequences of the fraud. Cf. R. 156 (Judge Edgerton dissenting).

(137 F. 2d 764, 766, quoted at R. 52-53) and the District Court in the antitrust case (*United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612, quoted at R. 54-55), had declared that Dorsey had participated in the fraudulent scheme. Judge Edgerton, dissenting below, thought the proof as to Dorsey "conclusive", and Judge Morris, in the District Court, held that there was "ample and substantial evidence" to support the Commission's findings to that effect (R. 44).

The evidence which proves this conclusively is set forth at length in the findings of the Patent Office Committee (R. 57 *et seq.*) and in Judge Morris' opinion (R. 26 *et seq.*). It seems sufficient here to refer to the following facts:

Dorsey was a party to the original discussions which resulted in the Clarke article (R. 57, 95-96, 100). Hatch consulted with Dorsey in preparing the article (R. 58, 100). Dorsey admitted that he had received the manuscript from Hatch and made several minor suggestions (R. 130, 137). Subsequently, he requested a copy of the article (R. 62, 115), and received a letter from Hatch (quoted at pp. 9-10, *supra*), which describes the plan to have Clarke sign the article and publish it in a trade journal. Hatch testified that "Mr. Dorsey knew what was going on" (Exhibit 67, p. 3111).¹ And Dorsey admitted that at his request a copy of the

¹ Exhibit 67 is Hatch's testimony in the antitrust case which, reprinted, was introduced in evidence by Hatch in the present proceeding (Tr. 472-473).

magazine containing the article was obtained and filed as a part of the Patent Office record in the Peiler application (R. 131, 110). A brief subsequently filed by Dorsey in the Patent Office, in the Appendix to which the article was printed in full (Ex. E, pp. 509, 593-605) stated (R. 73, Ex. E, pp. 477-478):

That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke
* * *

Brown testified that "Mr. Dorsey and I spent a great deal of time on that brief," and that "I happen to remember that that particular paragraph which I have read was dictated by Mr. Dorsey in my presence" (R. 96, see Tr. 376.) This was all done at a time when there was great danger that the Patent Office would not approve the application (see p. 5, *supra*).

These facts, we submit, establish without any question that Dorsey was a knowing participant in the fraudulent scheme, despite the inability of the court below to find "even a shred of evidence" to that effect.

The majority below disagreed with the views expressed by Judge Edgerton (R. 156) and Morris (R. 24-25) as to the applicability of the substantial evidence rule to test the Commissioner of Patents' findings of fact, and thought that the appellate

court was entitled to examine the record *de novo* (R. 144-148). The scope of review in such cases as this presents an important question. But on the evidence in this record, whatever the proper function of the appellate court in reviewing the evidence, Dorsey's participation in the fraudulent scheme was conclusively shown.

(b) Although respondent had never so argued, the court below found that Dorsey's case had been improperly joined with those of the other three practitioners before the Patent Office, and that this constituted a "mob procedure." (R. 149) Such a consolidation of cases arising out of the same transaction would have been entirely lawful even if the parties had not consented. Cf. Federal Rule of Civil Procedure 20. Here, moreover, the four attorneys expressly agreed to the consolidation of the four cases for the purpose of making a joint record. Tr. 60-61, printed in the Appendix *infra*, p. 31.*

(c) The record is equally clear, as the District Court (R. 47) and the dissenting judge noted (R. 165), that the show cause order apprised respondent of the matters which he was called upon to answer, and that he was found guilty only of these charges, i.e., "participat[ing] in the preparation of [the

* The court below found nothing in the record to support the assertion in the Government's brief below that the parties had consented to the consolidation (R. 149). Since there had been no controversy between the parties as to this point, that portion of the transcript had not been printed by either party in the court below.

Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of [the Peiler] patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authority of said article and influencing the action of the Patent Office on said application" (compare R. 13 (charges in show cause order), with R. 89-90 (charges of which the Committee found respondent guilty)). See *supra*, p. 7. That respondent was in fact fully apprised of these charges is manifest from respondent's answer filed in reply to the show cause order before the introduction of any evidence (R. 132-140).⁹

The court below (R. 154) stresses in this connection the Committee's reference to payments to Clarke in 1932 and to the use of the article in the Court of Appeals for the Third Circuit. But as the District Court recognized (R. 34), the Committee considered these subsequent events not in support of additional charges, but only as they "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time" (R. 74). Proof as to these activities (in which Dorsey was not found to have participated (R. 74)) did

⁹ We do not know upon what the opinion below relied for the "five counts" (R. 150) on which it says the Patent Office found Dorsey guilty. There are no such charges in the record.

not constitute additional charges which Dorsey had no chance to meet.

(d) The court below thought that the Patent Office had improperly imposed upon the respondent attorneys the burden of proving their innocence. What happened was that the Committee first received as evidence from the Department of Commerce, the records in the earlier cases "only to the extent that they contain written evidence in the form of admissions and certain other papers hereinafter identified as having been signed, sent, or received by these respondents as they purport to have been" (R. 56-57. See Tr. 32-38). In the absence of explanation this established *prima facie* the fraud and respondents' participation in it. The effect, as all parties understood, was to shift to the respondents the burden of going forward with the introduction of evidence to rebut the Government's *prima facie* case. Respondents did not at that time object to this procedure; on the contrary the attorney for two of them, with no dissent from Dorsey, agreed to it (Tr. 17-19, Appendix *infra*, pp. 28-31). The remaining evidence in the record was introduced entirely by the respondents.

This did not mean that the burden of proving innocence rested upon the respondents. The Patent Office did not hold that any such burden had been placed upon respondents, or that they had failed to sustain it, but that the "record
* * * indubitably and conclusively shows and

establishes that the respondents and each of them has been guilty of gross misconduct." (R. 89.)

3. Review of the decision below is important here not only because the court below has refused to accept the rulings of this Court as they affect this particular case, but because its opinion, together with its opinion in *Broadcasting Service Organization, Inc. v. Federal Communications Commission*, 171 F. 2d 1007, pending on petition for writ of certiorari, No. 584, this Term, reflects a conception of the duties of practitioners before administrative agencies which is substantially lower than the uncompromising obligation to be honest and to make full disclosure prescribed by this Court in the *Hazel-Atlas* case, in *Precision Instrument Co. v. Automotive Co.*, 324 U.S. 806, and in *Federal Communications Commission v. WOKO*, 329 U.S. 223. Cf. *Hannegan v. Read Magazine*, 158 F. 2d 542, reversed *sub nom. Donaldson v. Read Magazine*, 333 U.S. 178, which also involved the failure of the court below to recognize the fraudulent nature of a plan to deceive the public.

In particular the court below plays a vital role in the review of Patent Office decisions, since jurisdiction to review Patent Office disbarments is vested exclusively in the courts of the District of Columbia Circuit (35 U.S.C. 11). Moreover, strict enforcement of high standards of ethics upon the practitioners is imperative in Patent Office pro-

ceedings. Because of the secrecy surrounding pending applications in order to prevent premature disclosure, the Patent Office frequently has no choice but to accept representations as true and thereby is compelled to rely upon the complete integrity and honesty of the applicants and their representatives. See R. 38-89. In addition, since patents constitute "an exception to the general rule against monopolies and to the right to access to a free * * * market" (*Precision Instrument Co.* case at 816), the possession and assertion of patent rights are "issues of great moment to the public." *Hazel-Atlas* case at 246; *Precision Instrument* case, *ibid.* In these circumstances, the refusal below to give effect to these standards deprives the Patent Office of the most effective means available with which "to safeguard the public in the first instance against fraudulent patent monopolies," and makes it extremely difficult, if not impossible, for that Office to protect itself and the public "from being classed among the 'mute and helpless victims of deception and fraud.' *Hazel-Atlas Glass Co., supra*, 246." *Precision Instrument Co.* case at 818; cf. *Federal Communications Commission v. WOKO*, 329 U. S. 223.

4. A reading of the opinion below will, we submit, demonstrate that this is an appropriate case for the exercise of the supervisory authority of this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL, 1949

APPENDIX

Additional excerpts from testimony before the Patent Office's Committee on Enrollment and Disbarment:

* * * * *

Tr. 16-18

Mr. Brown [Special Assistant to the Secretary of Commerce]: I don't think we need to argue the matter at great length. I would like to say just a little bit more about our position. The feeling on this side of the table is that a rule to show cause has been entered, and that the burden is on the Respondents to come in and show why they should not be disbarred. That is the issue that we want to present here, and it might as well be presented now. We think that all these decisions, and the record on which the *Hazel-Atlas v. Hartford-Empire* case was decided in the Supreme Court, are necessarily before you to be considered. These gentlemen are here, and certainly so far as I am concerned, so far as I know, the policy we conceive is this: There will be no objection to their answering them, contravening, disputing them, but the Patent Office cannot ignore the findings of Courts that have been made where substantially the same issues, except the guilt of these particular individuals, were tried and were decided.

I think you are bound to receive those records, subject, of course, to any argument as to materiality, relevancy or binding effect.

Mr. Goodrich [counsel on behalf of defendants Brown and Hatch]: The burden is on the

Respondents. All right. We will take it. We are here for that purpose, to meet that burden. We want to meet it in an orderly, legal way, according to the rules of procedure, and the issues here are not the same, gentlemen, as they were in those cases, as Mr. Brown said. The issues in those cases were against Hartford, the issue at Toledo was whether Hartford was guilty of violation of the Anti-Trust Act and the issue in Philadelphia in the Hazel case was whether there was such newly discovered evidence as the Defendants claimed, that the decree entered in 1932 should be reopened on the grounds of newly discovered evidence.

That charge the Third Circuit Court of Appeals, under the circumstances, took as being the equivalent of a charge of fraud on that Court because of the Clarke article to which Judge Buffington referred in his opinion, but the issue was a very narrow issue of procedure, namely whether the Court had the power to reopen its decision entered ten years before, and whether there was newly discovered evidence which would justify such an unusual course.

The Circuit Court took that case to itself and considered it itself, because had there been fraud it would have been on the Third Circuit Court. Now, it considered that case on its merits and it found for Hartford. While it disapproved of the ghost-writing, it said that article worked no fraud on this Court, and there is no newly discovered evidence here, because the facts pertaining to the authorship and publication of that article were known to

those parties and to this Court in 1932 or before. That was a decision on the merits by the Third Circuit Court. That decision was reversed by the Supreme Court, again on a truncated record. The story these Respondents must tell you has never been told, and we want to come in and put a clean record before you, make it from the start. I don't care what your charges are based on. You found reasonable grounds to bring them. We are here to answer.

* * * * *

Tr. 19

Mr. Wood [counsel for defendant Carter]: Mr. Carter was not in any way connected with the Hazel-Atlas litigation, as an attorney or witness. He had no part in it whatsoever. The Owens-Illinois Glass Company had no place in the litigation and was not a party to the litigation. Mr. Carter had absolutely no standing in that matter which would have given him opportunity to say anything. I am told that at the hearing in the Supreme Court he was so outraged by what was going on that his friends had to restrain him from interfering and making a statement on his own behalf. He had no right to make a statement, and did not make one, and this is his first opportunity to do anything on his own behalf.

Mr. Dorsey: I want to fortify what Mr. Wood said. After the hearing in the Supreme Court, and after the decision, Mr. Carter took up with me whether we, who were outsiders in the whole matter, had any right whatever or any opportunity to present our case to the

Court, and we reached the conclusion there was no redress for us until charges were preferred, when we would have a chance to answer. Therefore, I welcome these charges.

* * * * *

Tr. 60-61

The Chairman: Shall we go ahead with our proof? I was going to ask if there was any objection to our combining and making a consolidated record.

Mr. Dorsey: Except, your Honor, I would like my testimony to come in by itself, because it is such a small part of the enormous picture. I would like an opportunity to present my case by itself anywhere in their case that it fits in.

Mr. Goodrich: May we work that out?

The Chairman: Yes.

Mr. Goodrich: I am sure we can adjust that between us.

Mr. Brown: Mr. Dorsey, the testimony of these other men so far as it affects you will be part of your case.

Mr. Dorsey: Yes, but so far as I know they can't say anything about me, because I didn't see them.

Mr. Brown: But if there is anything about you—

Mr. Dorsey: Oh, yes; it is sworn testimony, and I have an opportunity to cross-examine.

Mr. Goodrich: I think we all understand that although we have four cases here, there will be but one record.

The Chairman: Yes.

* * * * *